Supreme Court, U. S.
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No. 76-1539

In the Supreme Court of the United States

OCTOBER TERM, 1977

MORGAN P. KOERNER AND JUANITA B. KOERNER, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

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1. The first question presented in this federal income tax case is whether cash meal allowances paid to petitioner[1] as a police trooper of the West Virginia Department of Public Safety are excludable from gross income under Section 119 of the Internal Revenue Code of 1954 (26 U.S.C.). That statute provides an exclusion for the value of meals in kind provided by an employer to his employee, but only if they are (1) furnished for the convenience of the employer; and (2) provided on the business premises of the employer.

The pertinent facts are as follows: During 1967, 1968, and 1969, the State of West Virginia paid to each police trooper

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[1]"Petitioner" refers to Morgan P. Koerner. Juanita B. Koerner is a party solely because she filed joint returns with her husband for the years in issue (Pet. App. A 1A, n. 1).

of its Department of Public Safety a fixed daily meal allowance without regard to the amount, if any, he spent for meals. The daily allowance was $5.50 in 1967 and $5.75 in 1968 and 1969 (Pet. App. A 3A). The troopers were not subjected to any limitation as to the places at which they could eat their mid-shift meals, except that the locations could not be too remote from the assigned patrol area (Pet. App. A 4A).

In amended returns for 1967-1969, petitioner excluded the cash allowances from gross income and sought a refund on the ground that the payments were excludable under Section 119. In this refund suit brought by petitioners, individually and as representatives of a class of all members of the West Virginia Department of Safety, in the United States District Court for the Southern District of West Virginia, the district court held that the meal payments were excludable from gross income under Section 119 (Pet. App. A 1A-11A). In so holding, the district court followed the decisions in *United States* v. *Barrett*, 321 F. 2d 911 (C.A. 5); *United States* v. *Morelan*, 356 F. 2d 199 (C.A. 8); and *United States* v. *Keeton*, 383 F. 2d 429 (C.A. 10) (Pet. App. A 5A). The court of appeals reversed (Pet. App. C 14A-17A). While it acknowledged that its ruling was in conflict with the appellate decisions relied upon by the district court, it expressed agreement with *Wilson* v. *United States*, 412 F. 2d 694 (C.A. 1), which held that such cash allowances were not excludable from gross income under Section 119 (Pet. App. C 16A-17A).

The question of the taxability of these cash meal payments is currently before the Court in *Kowalski* v. *Commissioner*, 544 F. 2d 686 (C.A. 3), certiorari granted,

March 28, 1977 (No. 76-1095).[2] We therefore believe it would be appropriate for the Court to hold this case for disposition in accordance with its decision in *Kowalski*.

2. In the event the cash payments are held to be excludable from gross income, petitioners present a second question whether they can bring a class action on behalf of all members of the West Virginia Department of Public Safety. The district court permitted petitioners to amend their complaint "so as to make this a class action as well as an individual action" (Pet. App. A 1A, n. 2). While the court of appeals recognized that its holding in favor of the government on the Section 119 issue made it unnecessary for it to resolve the class action question, it stated that it was inclined to agree with the government that a tax refund suit cannot be certified as a class action (Pet. App. C 15A, n. 1). See, *e.g.*, *Agron* v. *Illinois Bell Telephone Company*, 325 F. Supp. 487 (N.D. Ill.), appeal on this issue dismissed as moot, 449 F. 2d 906 (C.A. 7); *Green* v. *Walters*, 32 A.F.T.R. 2d 5963 (E.D. Cal.). In order for a taxpayer to prevail in a refund suit, he must establish the exact amount of his overpayment. *Lewis* v. *Reynolds*, 284 U.S. 281, 283. No member of the class other than petitioners submitted such evidence. There is accordingly no basis for review of the class action question at this time. If, contrary to our submission, the Court should ultimately hold in *Kowalski* that these cash meal payments to police troopers are excludable from gross income, this case should be remanded

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[2] *Kowalski* also presents an initial question whether such payments are includable in "gross income" within the meaning of Section 61 (a) of the Code. The Section 119 issue is also presented in *Smith* v. *United States*, 543 F. 2d 1155 (C.A. 5), petition for a writ of certiorari pending, No. 76-1243.

to the court of appeals for initial disposition of petitioners' class action claim.[3]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

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[3]We are serving a copy of this memorandum upon counsel for the respondents in *Kowalski* (No. 76-1095) and *Smith* (No. 76-1243).